order in view of the circumstances of this case and that none of the plaintiff's partners has intervened.

Also, the counsel contended that the deed of assignment of 1983 was an assignment of the whole premises and therefore illegal under the Control of Rent Act 1966 and cited the case of *Lee Thin Pung* v *Lim Seang Kee & Anor*.[1]

If the assignment was illegal, all the more the defendant ought not to continue remaining in occupation as his presence was made possible because of his employment in Syarikat Aman. I am not convinced how the question of illegality of the assignment can be of assistance to the defendant in opposing this application.

The defendant had direct interest in the premises only under the 1986 agreement wherein he was cited as the second party. To determine their relationship in that whether it arose out of a tenancy or a licence one has to ascertain the nature of the transaction: *Shell-Mex & BP Ltd* v *Manchester Garage*[2] and *Woo Yew Chee* v *Yong Yong Hoo*.[3] By virtue of cl 4 of the agreement, the defendant was to vacate the premises on or before 31 December 1986. Clause 4 reads:

> The second party shall vacate and deliver up possession of the whole of the premises known as No 73, Jalan Mahkota, Kuantan, to the first party and remove all his goods and stocks only from the said premises on or before 31 December 1986. It is further mutually agreed that the second party's occupation of the said premises until 31 December 1986 or such earlier date as the case may be shall in no way be deemed to be or construed to be a tenancy or subtenancy of the said premises or licence to occupy the said premises or to confer any right whatsoever under any prevailing law to occupy and continue to remain in occupation of the said premises.

I am in agreement with the counsel for the plaintiff/applicant with regard to the reading of cl 4. In fact no tenancy of any kind was intended to be created in favour of the defendants before 31 December 1986. At best, he contended, only a mere licence was envisaged conditional on the defendant's vacating the premises by 31 December 1986. The Federal Court in the case of *Woo Yew Chee* v *Yong Yong Hoo*[3] reiterated the test enunciated earlier by which to ascertain whether a tenancy or merely a licence was intended to be created and I quote (p 133):

> The ultimate test is the nature and quality of the occupancy: whether it is intended that the occupier should have a stake in the premises sublet or whether he should have only a personal privilege...

The 1986 agreement was entered into on 17 May 1986 and by 31 December of that year, the defendant was to vacate the premises taking away with him the partnership business after having paid the compensation as agreed in respect of the said business to the plaintiff and his partners. The purport of the agreement was simply that the defendant was to take over the business and then leave the premises. The defendant had no right or stake in the premises. He was given only a personal privilege to remain just to give him time to make all the preparations to leave. Because the defendant refused to leave after 31 December 1986, he had thereafter become a trespasser.

Finally, counsel for the defendant/respondent argued that s 54(1) of the Specific Relief Act 1950 would not allow an injunction to issue in view of the circumstances of this case as this is not a case of breach of trust. The said provision reads:

> An injunction cannot be granted – (i) when equally efficacious relief can certainly be obtained by any other usual mode of proceeding, except in case of breach of trust.

In the present case, after 31 December 1986, the defendant had no business to be on the premises any longer and since that day he had therefore become a trespasser. On the authority of the case of *Shell-Mex & BP Ltd* v *Manchester Garages Ltd*,[2] I see no reason why an injunction cannot issue against the defendant.

In the circumstances, I therefore granted an order in terms of the application with damages to be assessed by the senior assistant registrar.

Order accordingly.

Solicitors: *Yusuf Lee Pathma & Marbeck*; *Wong & Associates.*

Reported by *Wong Kim Fatt*

Public Prosecutor v Chan Ah Kow & Anor

HIGH COURT (KUALA LUMPUR) – FEDERAL TERRITORY CRIMINAL TRIAL NO 39 OF 1984
KC VOHRAH J
26 APRIL 1988

Criminal Law – Dangerous drugs –Trafficking in – Common intention – First accused acquitted at close of prosecution case – Prima facie case against second accused – Presumption – Defence of no knowledge – Dangerous Drugs Act 1952, s 39 B(1)(a) & (2) – Penal Code (FMS Cap 45), s 34

The first and second accused were charged with trafficking in dangerous drugs, ie 1,599.74g of heroin on their own behalf on 23 May 1984 at the 4th mile, Jalan Cheras, Kuala Lumpur, in furtherance of their common intention in contravention of para (a) of sub-s (1) of s 39B of the Dangerous Drugs Act 1952, read with s 34 of the Penal Code. The police had acted on information, laid an ambush at the Taman Midah roundabout and spotted the motorcycle of the two accused proceeding towards the roundabout. On seeing the accused, the police, who were in civilian clothes, tailed it in a car until they were at the 4½ milestone, Jalan Cheras. When the car came abreast of the motorcycle the police identified themselves and ordered the two accused to stop. The motorcycle did not stop but instead it sped up a little bit. Eventually, the police car managed to squeeze the motorcycle to the sidetable, where the pillion-rider, ie the first accused, fell on the sidetable while the rider, ie the second

accused, fell into the drain by the side of the road together with his motorcycle. The police arrested the two accused and discovered a package wrapped in a red plastic bag in which were found four brown packages containing 1,599.74g of heroin. The first accused was acquitted because there was no evidence that he was in control of the heroin and hence no inference of common intention could be made. The learned judge amended the charge against the second accused by dropping the element of common intention. He claimed trial to the amended charge and called two witnesses, one of whom was the first accused who had been acquitted at the close of the case for the prosecution. The second accused denied knowledge of the bag of heroin found in the basket attached to his motorcycle. He said the bag was put there by the first accused. The first accused denied knowledge of the contents of the plastic bag and alleged that he was asked by his tenant to pass the bag of 'medicine' to someone in Pudu.

Held, convicting the second accused:

(1) Having reviewed the totality of the evidence adduced, the learned judge found that no reasonable doubt has been created on the prosecution's case that the second accused, riding his motorcycle, carried in a basket attached to the motorcycle and which was between his legs, a bag holding four packages containing 1,599.74g of heroin, and that he attempted to flee from the police after the police had identified themselves, and that he had control of the heroin.

(2) Having considered the totality of the evidence adduced, on a balance of probabilities, the second accused was transporting the heroin fully aware of the heroin, for the purpose of distributing the large quantity of high quality heroin. The defence evidence viewed against the prosecution evidence clearly shows that he was involved in the trafficking with a confederate and so far as the second accused is concerned the charge of trafficking has been made out against him.

Case referred to

1 *Mahbub Shah* v *Emperor* AIR 1945 PC 118 (refd)

Legislation referred to

Criminal Procedure Code (FMS Cap 6) s 425
Dangerous Drugs Act 1952 ss 33, 37(d), 39B(1)(a), (2)
Penal Code (FMS Cap 45) s 34

Zaini Abdul Rahman for the Public Prosecutor.
Jeffrey Fernandez for the accused.

Cur Adv Vult

KC Vohrah J: The first and second accused were charged as follows:

> That you jointly on 23 May 1984 at about 10.10 am, at the 4th mile, Jalan Cheras in the federal territory of Kuala Lumpur, in furtherance of the common intention of you both, did on your own behalves traffic in dangerous drugs, to wit, 1,599.74 g of heroin, in contravention of para (a) of sub-s (1) of s 39B of the Dangerous Drugs Act, and thereby committed an offence punishable under s 39B(2) of the said Act, read with s 34 of the Penal Code.

ASP Hasnan bin Hamzah (PW3) with Inspector Maarof (PW4) and Detective Corporal Mohd Saad, acting on information, waited in a car near Taman Midah roundabout at about 10.05 am. They were in civilian clothes. PW3 saw a motorcycle WAV 4932 proceeding towards the roundabout from the direction of Taman Midah.

On seeing this motorcycle PW3, who was driving his own car, said he tailed it for about five to ten minutes away from the roundabout, about half a mile from it, until they were near a BP petrol station at the 4½ mile stone, Jalan Cheras. He instructed Inspector Maarof to introduce themselves as the police and to order the rider of the motorcycle and his pillion to stop. He said Inspector Maarof poked his head out of the car window, showed his authority card and shouted out 'Polis! Polis! Berhenti' but the motorcyclist did not stop. At that time the motorcycle was about five to six feet ahead of the car. PW3 said he noticed that the pillion-rider was looking behind towards his vehicle off and on before this identification but it became more often after the identification. He also saw that there was a basket between 'the handle of the motorcycle and the rider of the motorcycle'. He said the basket was between the legs of the rider and he noticed a package wrapped in a red plastic material in the basket.

PW3 said that after PW4 had shouted out to these two people, the rider of the motorcycle attempted to accelerate the speed of the motorcycle and when he saw that he 'squeezed the motorcycle to the left side of the road, on to the sidetable where there were small stones'. The rider tried to come out onto the road proper, the attempt was not successful and both the rider and the pillion fell onto the sidetable. He stopped his car and all of them rushed towards the fallen motorcycle. He amplified what he saw – 'The motor cycle had fallen into the drain together with the rider. The pillion-rider fell onto the sidetable.'

He said he rushed towards the pillion-rider, the first accused, while Inspector Maarof and Corporal Saad rushed towards the rider of the motorcycle. He said that the pillion-rider attempted to resist arrest but he managed to arrest and handcuff him. He added that Inspector Maarof and Corporal Saad managed to arrest the rider of the motorcycle, the second accused. This incident took place at a place slightly past the BP petrol station.

He then went up to the motorcycle and he saw a package wrapped in a red plastic bag (P25) and he took it out. In the presence of both the accused, from the bag he took out four brown packages (P27A-D), each wrapped in brown paper, and in each package he found powder in a compressed form which he suspected to contain dangerous drugs. The chemist report stated that the substance in the four packages altogether contained 1,599.74g of heroin.

He did a body search on both the accused and recovered several items from them.

He then brought the red plastic bag and the four packages containing the heroin and other exhibits to the Cawangan Anti-Dadah office at Jalan Kia Peng together with the two accused and handed both of them and the exhibits to Inspector Amarjit Singh (PW5) on the same day.

Inspector Maarof (PW4) gave substantially similar evidence though there was some variance on some of the facts described by PW3. PW4 confirmed the laying of the ambush at the Taman Midah roundabout and he confirmed spotting the said motorcycle with two persons on it and tailing it. He said that when the car came abreast of the motorcycle he poked his head out, showed his authority card and shouted 'Polis! Polis! Polis!' and ordered the persons to stop. The motorcycle did not stop but instead it speeded up a little bit and he saw the pillion-rider (the first accused) looking at him and PW3 several times. PW3 said the traffic was heavy at that time and that perhaps it was difficult for the motorcycle to slip through and pass. Then, past a petrol kiosk, he saw the pillion-rider fall on the sidetable and the rider of the motorcycle, the second accused, fall into the drain by the side of the road together with his motorcycle. While he did not mention that the police car squeezed the motorcycle to the side, he mentioned that 'we subsequently managed to stop the motorcycle'. The motorcycle fell straight into the drain in a standing position. He said PW3 then stopped his car near the pillion-rider and he and DPC Saad went up to the motorcycle in the drain and lifted up the rider of the motorcycle; his right leg was caught between the motorcycle and the wall of the drain. By that time, he said, PW3 had come along to where he was with the first accused and he saw PW3 recover a red plastic bag from the carrier of the motorcycle. The red bag contained four packages wrapped in brown paper.

He also said that the rider of the motorcycle had injuries on the right leg from the thigh downwards. He explained that this man's right leg was trapped between the motorcycle and the drain when he assisted him to come out of the drain.

I now turn to the evidence of PW5, Inspector Amarjit, the investigation officer of this case. He confirmed receiving the red plastic (P25) containing the four packages (P27A-D) from PW3 at the Cawangan Anti-Dadah Office at Jalan Kia Peng on the day of the arrest. He confirmed receiving the personal items found on both the accused together with the search lists made out in respect of each of them. He stated that he packed the four packages (P27A-D) which were marked A1-A4 in brown paper and marked and sealed this larger package and sent the latter to the government chemist Mr Lau Cheng Siew on 28 May 1984. On the same day Mr Lau returned to him the same larger package, this time resealed with the chemistry department seal after Mr Lau had taken samples from each of the four packages packed in the larger package. On 28 August 1984 he received from Mr Lau a chemist report (P33) together with a brown sample from package A1-A4. He said packages A1-A4 referred to P27A, B, C and D respectively.

PW5 also stated that he went to the scene with a police photographer (PW2) in order for photographs (P3A to C) to be taken and for a sketch plan (P31) of the scene to be drawn.

The chemist report (P33) indicated that the gross weight of the substance in the four packages was 1,795.42g and contained 1,599.74g of heroin.

Before I deal with the question of whether a prima facie case of trafficking has been made in respect of both the accused I would need to consider the evidence of the prosecution witnesses in the light of questions directed at them by both defence counsel.

Principally the cross-examination was directed at showing that both the accused were unaware of the drugs by the allegation that the car driven by PW3 collided into the motorcycle riden by the second accused. The allegation was that that was the reason why the basket of the motorcycle was damaged and why the second accused suffered injuries on his leg. There was, however, no dispute that the four packages of drugs were found in the basket of the motorcycle. But it was disputed that Inspector Maarof shouted to both the accused to stop. It was disputed that the rider of the motorcycle accelerated his motorcycle after the shout. It was shown that PW3 said the police car tailed the motorcycle for half a mile for about five to ten minutes while PW4 said the tailing was for about half an hour. It was disputed that the pillion-rider (first accused) looked at the people off and on when PW4 had shouted to them to stop and it was disputed that he attempted to resist arrest by PW3. There was also the rather strange question put by counsel for the first accused (rider of motorcycle) to ASP Hasnan that after both the accused fell, he and the other officer covered the faces of both the accused.

As regards the allegations that PW4 did not shout to both the accused to stop and that the car of PW3 collided into the motorcycle, the evidence of PW3 and PW4 was clear that PW4 shouted to both of them to stop and the speed of the motorcycle did increase even if slightly, and when hemmed in by the police car, the motorcycle went onto the sidetable where there were stones. It seems clear that the uneven nature of the sidetable caused the motorcyclist to lose balance and as a result the pillion-rider fell down on the sidetable while the motorcycle ended upright in a drain by the side with the rider on it. Admittedly, PW3 stated that when PW4 shouted to the two accused identifying himself as a police officer his car was five to six feet behind the motorcycle, while PW4

stated that when he did so, the car was four to five feet abreast of the motorcycle. And admittedly there was discrepancy between the evidence of PW3 and PW4 as to how long the police car tailed the motorcycle. But these are matters of recollection of details of events which took place some four years ago, of fleeting events observed in a moving vehicle, and they do not detract from the main thrust of that aspect of the prosecution evidence that the police spotted and tailed a motorcycle, that the police identified themselves at close quarters and that after their identification, the motorcycle instead of stopping continued to move on. Both PW3 and PW4 could have but did not exaggerate – PW3 said the motorcycle attempted to accelerate and PW4 said the motorcycle 'speeded a little bit'.

The allegation that the pillion-rider (the first accused) did not look behind off and on was denied by PW3 and PW4; their clear evidence was that he did.

As regards the allegation that the pillion-rider did not struggle during the arrest, PW3 stated that the pillion-rider (the first accused) fell onto the sidetable and he rushed towards him to effect his arrest but 'there was a slight trouble when the accused was trying to avoid the arrest'.

As regards the injuries sustained by the second accused, there was no denial that he had injuries on the outer part of his right limb from the thigh downwards. PW4 had stated that the motorcycle and the rider (the second accused) on it had landed upright in the drain and his right leg was 'caught between the motorcycle and the drain wall and could not come out'. The injuries were clearly sustained by the second accused when he fell into the drain, and not as a result of the police car colliding into the motorcycle. The defence attempt to show that the two accused were unaware of the presence of the police until their motorcycle was knocked into by the police car, is not borne out by the evidence of PW3 and PW4 describing the overt acts of both the accused before the discovery of the drugs in the basket carried by the motorcycle.

As regards the allegation put to PW3 that the faces of the two accused were covered at the scene, PW3 denied this.

At the close of the case for the prosecution, on a prima facie basis, it seems unarguable that it was the second accused, riding the motorcycle, who had control of the motorcycle. The exposed basket attached to the front body of the motorcycle lay suspended between his legs and in this basket, unconcealed, was the red translucent plastic bag containing four packages weighing over 1.7 kg. There can be no doubt he was aware of these four packages, he was in close proximity to them, he was nearest to them and to my mind he had control over them when viewed with the other circumstances of the case. He was called upon to stop by a police officer after loud identification that the latter was from the police, but he did not stop. He continued to ride on, in fact, 'speeded a little bit' – but the traffic was heavy and he could not slip through the traffic – when hemmed in by the police car onto an unstable sidetable laid with stones, he lost his balance and ended up in the drain with his motorcycle. It is clear it was he who had control of the motorcycle and he attempted to escape from the police and there was no reason to do that unless he was aware he was transporting non-innocent goods; clearly he had control of the bag containing the four packages in the basket attached to the motorcycle; he was the one who could take the four packages out of the reach of the police if the motorcycle had not ended up in the drain. And so far as he is concerned, having been in control of the four packages, under s 37(d) of the Dangerous Drugs Act 1952 it has to be presumed that he was in possession of the four packages containing the heroin and it has to be presumed that he was aware that the drug was heroin. Again, since the heroin was 1,599.74g, the presumption is that he was trafficking in the heroin.

Whilst on a prima facie basis the criminal act of trafficking in heroin has been made out against the second accused, can such act of trafficking be attributable to the first accused? Is there any evidence to show that it was the common intention of both the second accused and the first accused to traffic in the heroin? Were both of them acting in concert for the trafficking? The evidence showed that the first accused sitting as pillion-rider looked back off and on although it does not appear that he was aware of the presence of the police car at first. When, however, PW4 identified himself as the police and shouted for the motorcyclist to stop, his looking back off and on became more pronounced. Eventually after he fell down it appeared that he attempted to put up some resistance to his arrest. His action may appear highly suspicious but it has to be remembered that he was merely the pillion-rider of the motorcycle and had no control over the movements of the motorcycle. At best he appeared to be a lookout but there does not appear to be any evidence to show that he knew that a bag, let alone heroin, was carried in the basket between the legs of the second accused who was riding the motorcycle.

While it may be argued that the evidence relating to his acts could not well be those of an innocent man and that it must be inferred that he knew of the presence of the bag and its contents, his acts could equally point to the first accused being a mere passenger caught in a chase or a passenger who knew at best that the second accused was carrying non-innocent goods, not necessarily heroin, or a lookout for whatever reason the second accused intended him to keep a lookout for, the reason given by

the latter not necessarily being connected with the bag of heroin. It will be noted that PW3 had stated that the first accused 'attempted to resist arrest', not that he resisted arrest. The first accused is a huge hulk of a man while PW3 is of average build and my view is that the first accused could have effectively put up strong resistance to his arrest by PW3 if indeed he wanted to but the evidence that he 'attempted to resist' arrest or that 'there was a slight trouble' in effecting the arrest without the details as to what constituted the attempt or trouble is an opinion which needs to be kept in proper perspective in the light of the other evidence relating to the first accused. To my mind his behaviour was highly suspicious but there was lacking those extra circumstances to show at least he had control of the goods in the basket so that I may invoke the presumptions in s 37(d) of the Dangerous Drugs Act 1952 as I did in the case of the second accused, that he was in possession of the goods and that he knew the goods contained heroin, or circumstances to show that he did something in relation to the goods although they were out of his sight, and from which circumstances I may draw the inference that both of them intended to and did the act of trafficking in heroin, and that the act was done pursuant to a common intention of both of them. As is well known the inference of common intention should never be reached unless it is a necessary inference deducible from the circumstances of the case: see *Mahbub Shah* v *Emperor*.[1] The circumstances in this case though highly suspicious do not give rise to such an inference.

I asked for submissions on s 33 of the Dangerous Drugs Act as to whether I could amend the charge against the first accused for the offence of abetment of the trafficking by the second accused or for the offence of doing an act in furtherance of the offence of trafficking. Having heard the submissions my view is that there is no evidence of instigation nor of conspiracy to found a charge of abetment. Nor could there be a charge of abetment that he intentionally aided the trafficking as there was no evidence that the first accused intentionally aided the second accused to traffick in the heroin. As for the offence of doing an act in furtherance of the offence of trafficking, I had in mind that the evidence probably showed that he could have been a lookout, but again viewing the evidence as I did when I examined the question whether common intention could be invoked, the evidence does fall short of showing that his role as a lookout was behaviour which can constitute doing an act in furtherance of the offence of trafficking.

The net result of the case is that there was no evidence on which I could call the first accused to make his defence on the charge or on any amended charge and I therefore acquitted him.

I amended the charge against the second accused by dropping the element of common intention. He claimed trial to the amended charge. He declined to recall any witness.

Defence

Low Ee Tik (the accused) elected to give his evidence on oath and called two witnesses, DW2 (who had been acquitted earlier) and DW3.

He denied knowledge of the bag of heroin. He said the bag which was in the basket attached to his motorcycle was put there by Chan Ah Kow, the person who had been acquitted at the close of the case for the prosecution.

He also denied having been aware that the police had signalled him to stop. He said he was wearing a helmet which covered both his ears completely and that if one were to travel by the side of the road, which he did, one could only hear the sound of passing cars.

He stated that after passing a petrol station with Chan Ah Kow as pillion, 'Suddenly a private car squeezed and grazed against my leg and I fell into the drain.' He said his legs were pinned under the motorcycle.

As regards the red plastic bag of heroin he recounted how it came to be in the basket. He said he met Chan at a restaurant at Taman Pertama as appointed. The appointment was for Chan to recommend him a construction job. He said he had brought Chan, at his request, to a place near Taman Yulek. Then Chan told him to stop near a flat. At that place Chan told him to wait as he was going to look for someone. He said he parked his motorcycle and went for a bowl of laksa at one of the hawkers' stalls some distance away. Ten minutes after he had taken his laksa while still at the stall he saw Chan walking towards his motorcycle. The accused went back to his motorcycle and he saw that Chan carried a red bag similar to P25. He noticed that the bag contained 'something' but he did not pay attention to it and did not know what the bag contained. He did not ask Chan what it was either. Then according to him Chan told him, 'Now you take me out. Then I will take you to have a look at the worksite.' The accused said he then started his motorcycle and Chan put the red bag in front. Chan told him he had gone to look for someone. He said that Chan then requested him to bring him to the place where he had parked his car near the restaurant at Taman Pertama.

It is necessary to see what he had stated as regards how he came to know Chan and how and where he came to meet him that day. He had earlier stated that he was a construction contractor. He stated that he knew Chan only as Fei Lo and he had first met him about three years prior to their arrest at a tailor's shop at Jalan Chow Kit and that the next time he met him was at the Turf Club about three to four months prior to their arrest. He met

him subsequently quite often on Saturdays and Sundays at the Turf Club.

He stated that the Sunday before their arrest, Chan had asked him whether he had any construction work. The accused replied that he did not have any and Chan then 'told me if he happened to come across any construction work he would recommend me and he asked me if I was interested and I said 'yes'.' The accused stated, 'He said that if that was the case he wanted me to wait for him at Pertama Gardens near one restaurant.' He was supposed to meet Chan at 9 am.

The accused met Chan on the appointed date at about 10 to 15 minutes past nine in the morning. At the restaurant he stopped his motorcycle which he had borrowed from his younger brother. He said he had brought an extra helmet, which he normally did when he went out, and he saw Chan walk towards him. Chan then asked him to take him to a place near Taman Wah Yu (or Taman Yulek as he later said) for a while. He said he did so through a small path and he had to bypass a cemetery before reaching the place, the distance being about one to two miles.

So much for the evidence relating to his meeting with Chan and the reason for going to the flat. As recounted earlier the accused said that after Chan put the bag in front he asked the accused to bring him to the restaurant where he had parked his car. This was the place at Taman Pertama where the accused met Chan at 9.10 or 9.15 that morning. They were taking the main Cheras road this time to this place when the police car grazed against his leg.

The accused stated that he voluntarily gave a cautioned statement (D37). This substantially corroborated what he stated in evidence.

One other matter. Four cheques were found on him. His explanation was that he operated an illegal gambling den with some friends at Pudu. He explained that if the operators did not have sufficient cash they would try to borrow from 'loan sharks' and use three of the cash cheques as security. He said the other cash cheque of $4,000 was from a gambler who had lost in the den and that man had issued the cheque in lieu of cash.

His first witness was Chan Ah Kow who had been charged on the original charge of jointly trafficking with the accused. I had acquitted him for the reasons stated in my judgment. His evidence was that he was a tailor who worked for his brother at Pudu Raya and that he also did cutting at other tailors' shops. He said he knew the accused casually. He said he came to know him in 1981 or 1982 at a tailor's shop at Chow Kit road and he came to know that he was a construction worker when he came to the same tailor's shop for his shirts and trousers. Thereafter he used to meet him there. Three days before his arrest he had met the accused at the Turf Club and he had asked him if he had work and the accused replied that he did not have any as construction work was not good at that time. The accused said that he then told him he could recommend him some work and requested him to wait for him at a restaurant opposite the bus stop at Taman Pertama on 23 May 1984.

On that date after 9 am he met the accused at the place. Chan said he went there in his car and he said he told the accused he would recommend him a job. He stated he had found a job for the accused to lay terrazo (flooring) and to fix iron grills and do some painting work at a worksite in Jalan Shaw and the accused wanted to look at the worksite before he could quote the price for the job.

When he met the accused he told the accused that he wanted the latter to take him to Bukit Mewah and then he would take him to the worksite. At first he said he told the accused that he wanted to go there to collect rent but on further questioning he said he did not tell him he was going to collect rent. The accused then took him to his flat at Jalan Mewah.

He went up alone to his flat which he, as chief tenant, had rented out to one Lim Chang Ming (DW3) at $180 per month. There he collected his rent from DW3. He said that then DW3 asked him to hand over a bag similar to P25 to a friend by the name of Ah Choy. DW3 told Chan that it contained medicine and he wanted Chan to hand it over to Ah Choy in front of Wong & Lee Clinic at Pudu. DW2 said DW3 was a wireman and a childhood friend.

It is convenient at this stage to set out what DW3 said about this incident. He said he had rented a room in a flat from Chan at $180 per month. He rented the flat towards the end of 1983. On 23 May 1985, Chan visited him at about 10 am at the flat and collected the rent. As Chan left the flat five minutes later DW3 handed over a package containing heroin telling him it contained medicine and asking him to hand the package to one Ah Choy. He said he trusted Chan and he said the heroin he handed over to Chan did not constitute a large quantity.

DW3 said he knew Chan since his childhood days. He also said he was a wireman working for someone but that on that day he was unemployed. He said he had thrown away the keys to the flat. He denied that he did not live there. He said he had a few clothes with him at the flat but he did not keep any cooking utensils in the flat.

In his evidence he also stated he kept heroin in the flat in the room he lived in.

I now return to the evidence of Chan, DW2. Chan said that after leaving the flat he met the accused and

requested the latter to take him towards Pudu in order for him to hand over the package and at the same time to take him to Shaw Road to see the worksite. He said that as there was a traffic jam then he intended to use the motorcycle to go there. As he sat on the motorcycle he put the plastic bag into the basket of the motorcycle. He said he did not discuss the package with the accused. He stated that as they were proceeding towards Kuala Lumpur a car knocked into them and he fell by the roadside. He said the police did not show him the bag containing the drugs; instead he and the accused's faces were covered up and he only knew the contents were heroin after he had been brought to an office. He denied that the police shouted out to them to stop. He said that at that time he was wearing a helmet.

He also stated he made a cautioned statement to the police where he had not told the truth to the police. He said he did not admit in the cautioned statement that he put the bag in the motorcycle basket. He also agreed he did not mention DW3 in his cautioned statement.

As regards the cheques found in his possession, he said that for three of them he had no time to cash them and as for one other (P11E) dated 29 March 1984, that was given to him in exchange for a loan that he had given to a friend but he could not cash it as his friend told him to hold on as he had no money for it.

I now come to the evaluation of the defence which has to be done in the light of all the evidence adduced in the case.

As regards the evidence of the accused that he was not aware that the police had shouted out for him and the pillion to stop, this is clearly unbelievable. PW4 had stated that he had shouted out to them to stop. But the accused and Chan countered this by saying they were wearing helmets. The accused explained he could only hear passing traffic. Surely a voice shouting out at close quarters would be louder than the sound of passing traffic. In any event the evidence showed that on each handle bar of the motorcycle was a mirror and surely the spectacle that PW4 was making of himself, poking his head out of the window of a moving car and flashing an authority card near them would certainly have been noticed through the right wing mirror. In any event why did he speed up a little bit and try to escape? Why did Chan look back off and on more often if the police had not identified themselves? To my mind the evidence of PW3 and PW4 was clear that the police had identified themselves as the police and the motorcyclist had heard and seen the police and was attempting to escape. I do not accept the defence evidence that the police car grazed against the accused's leg and that was why he sustained injuries thereon. I also do not accept the evidence that the drugs were not shown to them at the scene.

Why would the motorcyclist, the accused, attempt to escape unless he knew the package he was carrying was non-innocent. There is no dispute that the red plastic bag was in the motorcycle basket between his legs. In my view no doubt has been created on the prosecution's case as regards the police identification, the accused being the motorcyclist, he attempting to run away, and the discovery of the bag of drugs in the motorcycle basket between his legs affirming that he had control of the drugs.

The question now is whether he has rebutted the presumption that he trafficked in the heroin.

The defence story is that the accused came to carry the bag on his motorcycle as a result of a casual request of DW3 made to Chan to deliver a bag of medicine to one Choy. Would anyone hand over a bag of heroin, and in this case a bag of high purity heroin – since the gross weight of the substance in the four packages was 1,795.42g and it contained 1,599.74g of heroin, the purity was 89.10% – to a friend, even if the friend was a childhood friend, so casually? Highly improbable in my view. To my mind transporting a huge quantity of very high quality heroin from one place to another would require careful planning, secrecy and reliance on trusted couriers to protect the obviously huge investment that would have been made on the drugs and to prevent detection by the police. Here we have a case where the story is that Chan had merely chanced a visit to his flat to collect rent from his tenant, DW3 and he was immediately co-opted to be delivery boy. Clearly an unbelievable story. The story goes further in that Chan was asked to deliver it to one Ah Choy, who, Chan said, he did not know well, and the bag was supposed to be delivered in front of Wong & Lee Clinic at Pudu – as casual as that.

Why did the accused and Chan go to the housing estate where Chan had a flat? The accused said the purpose of meeting Chan at Taman Pertama that morning was for Chan to show him the construction worksite Chan was recommending him but when he was there Chan requested him to take him to a place near Taman Yulek for a short while and he did not ask him why he wanted to go there. It will be remembered that Chan said he told the accused he wanted to go there to collect rent but on further questioning Chan changed his story and said he did not tell the accused that. I find that unusual. Chan wanted a favour from the accused to go somewhere and no explanation was proferred for going there. That apart, what was unusual was that Chan did not at that stage tell him where the worksite was – in fact no mention was made at all by the accused where the worksite was. The accused had stated that he met Chan at the Turf Club and the work that Chan wanted to recommend him for was the renovation of a house. When asked where this house was he said that he did ask Chan about it but that Chan told him he would show him. Chan's

evidence was that it was at Shaw Road. The accused never mentioned Shaw Road at all throughout his evidence although he had opportunity to do so. To my mind the story of a worksite was fabricated to explain why they met at Taman Pertama on 23 May 1984.

I come back to the reason why Chan wanted the accused to bring him to the flat. It was to collect rent from DW3 for his use of one of the rooms and the hall of his flat. Now that day was 23 May and he had still not collected his rent. Chan did say under cross-examination that he had gone to the flat previously several times but had not met DW3. He also said that DW3 was a wireman and he agreed that 23 May 1984 was a Wednesday and a working day. When asked how he knew that DW3, the wireman, would be in the flat that day when he was supposed to be at work he replied lamely, 'I went there on several occasions and he was not in. On that day I went there again to take a chance.' I find that his story of chancing a visit to collect rent from a wireman who, if he really lived in the flat would probably have been at work well past 9 am as again highly improbable and an invention to forestall the court from inferring that there was a pre-arranged trip to the flat by him and the accused to collect heroin for distribution. Again if he had really met DW3 at the flat and the latter had given him the bag telling him it contained medicine and he did not know that it contained heroin, why did he not so mention that in his cautioned statement? For if that was the truth he should have stated it at the earliest time and avoided putting his own life in jeopardy. My finding is that DW3 was not a tenant of DW2 in respect of the flat and that the visit to the flat by DW2 was pre-arranged with the accused for the purpose of collecting heroin from the flat for transport elsewhere.

This finding is further supported by the evidence of the investigation officer (PW5) who was recalled by the prosecution to show that Chan led PW5 and a police party to the flat on the day of the arrest and PW5 found in one of the rooms heroin and some items of clothing – a shirt, two pairs of long pants and four pairs of shoes. PW5 said that the shirt fitted Chan well. Both pairs of trousers too fitted him on their length and the size of the thigh except that they were tight at the waist. Through the tailor's label on the two pairs of trousers he found that the tailor who made them is Chan's brother. As for the four pairs of shoes, three pairs fitted his feet while the fourth pair was too large for him.

I had allowed the recall of PW5 under s 425 of the Criminal Procedure Code as I considered that DW3 had testified that Chan had no knowledge of the drugs at all. He had stated that he (DW3) had kept drugs in the room that he had rented from Chan. The DPP said he was caught unaware that DW3 was going to be called to give evidence on the accused's behalf. It will be remembered that it was only during the defence that the name of DW3 was first brought up. And it will be remembered that Chan testified that he had never mentioned the name of DW3 in his cautioned statement. DW3 himself stated he was arrested in 1985 for an offence under s 39B of the Dangerous Drugs Act. The charge in the present case relates to an offence under s 39B in May 1984. In the circumstances it did appear that the DPP was indeed caught by surprise by the testimony of DW3 and DW3 had appeared to corroborate the defence story that Chan was not aware of the presence of the drugs there as Chan had paid a chance visit to him at the flat to collect rent from him. I allowed the deputy public prosecutor to recall evidence to rebut that. And to my mind the evidence of PW5, when recalled, did rebut that. PW5 in fact had not heard of the name of DW3 during the investigations of this case.

As regards the evidence of PW5 relating to the shirt, two pairs of long pants and four pairs of shoes in the room where heroin was found, I am of the view that the shirt, two pairs of long pants and three pairs of shoes were Chan's. Chan is a huge man and DW3 is of slight build and it seems to me that DW3's story that he left some of his clothings in his room where the heroin was found, to show that he indeed rented the room from Chan, cannot be true. Why would Chan's clothings and shoes be found in DW3's room? To my mind my earlier finding that DW3 was not Chan's tenant, that Chan did not therefore go there on a chance visit but had deliberately gone there to collect heroin for the purpose of transporting it elsewhere after a pre-arranged plan with the accused is further strengthened.

Clearly the story that he met the accused in front of the restaurant on 23 May 1984 for the purpose of bringing him to the worksite but incidentally visiting the flat is not worthy of credit. I accept there was a meeting there between Chan and the accused at some time past 9 am on that day and I accept the story that the accused took Chan to the flat using 'a small path' but my view is that the sole purpose for it was to collect heroin from that flat and to deliver it elsewhere with the accused participating knowingly in the collection and transporting of the heroin. The accused and his motorcycle were necessary and integral elements in the scheme to transport heroin from the flat to somewhere else. It cannot be gainsaid that the motorcycle in the Malaysian scene is a ubiquitous vehicle which would hardly attract attention, fast and manoeuvrable and able to slip through heavy traffic unlike a car. Surely the choice of a motorcycle for use to deliver heroin that morning was no accident; it was a necessary vehicle to transport heroin in the heavy morning traffic along Cheras Road in relatively safe anonymity. And the accused was no innocent person riding his motorcycle blissfully unaware of the heroin; no reasonable doubt, as I

had stated earlier, has been cast on the prosecution's case that the accused attempted to flee from the police; the accused was part and parcel of the scheme to traffick in the heroin – he participated in the trafficking of the heroin.

There were attempts on his part to show that he did not know anything about the drugs. His story was that he was merely a casual friend of Chan, he only knew him as 'Fei Lo' and he went to see him on 23 May 1984 at Taman Pertama because Chan had offered to recommend him a job. I have my doubts as to a person going through all the trouble to look for and recommend a job for a casual friend. It would appear that the first time the matter of a construction job for Chan was mooted was on a Sunday, 20 May. The accused said that he met Chan on Sunday and Chan asked him whether he had any construction job and he replied that he did not have any. According to the accused, 'He (Chan) told me if he happened to come across any construction work he would recommend me ...' Now from this piece of evidence it is clear Chan did not have a job for him available as yet – if he happened to come across a job then he would recommend him. But in the next breath the accused said that when he told Chan he was interested Chan told him if that was the case he wanted the accused to wait for him at Pertama Gardens near one restaurant. How could it have been possible to fix a date for a job when Chan would recommend one 'if he happened to come across any construction work ...? Chan spoke of the meeting with the accused on 20 May and he said he told the accused he could recommend some work, the implication being that he had some construction work ready then, not 'if he happened to come across any construction work...' To my mind there was no conversation relating to the construction job; there was an appointment, not necessarily on Sunday (20 May) or at the Turf Club for the accused and Chan to meet for the purpose of going to the flat to collect heroin and for the accused to transport it on his motorcycle elsewhere, and the accused was aware of the purpose.

On his own admission the accused was operating an illegal gambling den with some partners for 19 days before the arrest. On his own admission he had paid the police off for operating the gambling den. He was a worldly man, not a naive man and I cannot believe his story of being unaware that he was being used by somebody else other than Chan. My view of Chan as I have held earlier is that he was part and parcel of the scheme to deliver the heroin from the flat to some other place and I cannot believe that the accused could not have seen through Chan; the pre-arranged appointment was for the purpose of taking heroin from the flat for delivery on his motorcycle to some other place. There was no evidence that on Sunday (20 May) the accused had agreed with Chan to use his motorcycle to visit the worksite. Why then an extra helmet for the use of a pillion-rider? The accused denied that he brought the helmet because that was pre-arranged. He said he had brought the extra helmet because it was normal for him to do so 'just in case'. He added, 'Sometimes my wife would go out with me.' Viewing the evidence as a whole I find that hard to believe. The motorcycle was a necessary element of the scheme for the trafficking of the heroin and the helmet was for Chan who had to be carried pillion on the motorcycle.

One aspect of the story needs also to be considered. For the journey out of the area of the flat the accused took Cheras Road; that was his own choice. The accused said Chan told him to bring him back to his car at Taman Pertama, the place where they had their appointment that morning. That would have meant that Chan, if the story is true, had intended to bring him to the worksite in his car. But if they had intended to go to Chan's car why did not the accused use the path that he had taken earlier to visit Chan's flat? According to Chan, using the path back would have entailed going uphill. That might be an acceptable explanation but for Chan's story that he requested the accused to proceed to Pudu (though he said he did not tell him the reason for going to Pudu) and to the worksite. So there was no question of going back to his car. The accused obviously tried to tailor his evidence to show that he was not using his motorcycle to go to the city although he was found on the main road leading to the city. My view is that he was fully aware of what he was doing, delivering heroin from the flat on his motorcycle.

The accused had made a cautioned statement one day after his arrest. The statement is consistent with his evidence that he gave in court. But I reject his cautioned statement in the light of my assessment of the defence story in the totality of all the evidence adduced; my view is that the accused tailored his and the defence evidence to fit his exculpatory cautioned statement.

Having reviewed the totality of the evidence adduced, my finding is that no reasonable doubt has been created on the prosecution's case that the accused, riding his motorcycle, carried in a basket attached to the motorcycle and which was between his legs, a bag holding four packages containing 1,599.74g of heroin, and that he attempted to flee from the police after the police had identified themselves, and that he had control of the heroin.

Having considered the totality of the evidence adduced, on a balance of probabilities, the accused was transporting the heroin fully aware of the heroin, for the purpose of distributing the large quantity of high quality heroin. The defence evidence viewed against the prosecution evidence clearly shows he was involved in the

trafficking with a confederate and so far as the accused is concerned, the charge of trafficking has been made out against him.

I find him guilty. And I convict him.

Order accordingly.

Solicitors: *Fernandez & Co.*

Reported by *Wong Kim Fatt*

Pamaron Holdings Sdn Bhd v Ganda Holdings Bhd

HIGH COURT (KUALA LUMPUR) – CIVIL SUIT NO C22-174-86
VC GEORGE J
13 FEBRUARY 1988

Companies and Corporations – Sale of shares – Contract for – Breach by buyer – Summary judgment sought by seller – Objections by buyer – Whether buyer can plead that sale was ultra vires – Whether compliance with s 132C(i) of Companies Act 1965 needs to be pleaded by seller – Companies Act 1965, ss 20 & 132C(i)

Contract – Sale of shares – Breach of contract – Whether such contract is enforceable by specific performance – Whether sale was entered into under duress and pressure

The plaintiff and the defendant entered into a written agreement for the sale and purchase of shares in a private limited company. The defendant defaulted in the payment of the purchase price and the plaintiff applied for summary judgment against it. In opposing the application, the defendant contended that: (a) the plaintiff had corrected its statement of claim by way of affidavits and this is not allowed; (b) it had entered into the agreement under duress and pressure; (c) s 132 C (i) of the Companies Act 1965 was not complied with by the plaintiff; (d) the transaction was ultra vires the plaintiff company; (e) for specific performance, there should not only be good consideration but also valuable consideration; and (f) a contract for the sale of shares is not a proper subject for specific performance.

Held, allowing the application:

(1) There were no defects or omissions in the statement of claim, and the affidavits filed by the plaintiff do not seek to supplement or amend or correct the statement of claim.

(2) The exact acts of duress and pressure and who were subjected to them and what the acts of concealment and deception were were not divulged. In any event, the fact that the alleged duress and pressure were said to have been applied prior to the agreements entered into and the agreements were subsequently completed without any protest does not show that the duress and pressure defence was made bona fide and it is so lacking in merit that it can be said to be frivolous and vexatious.

(3) It is ridiculous to suggest that every time a company sues on a contract, it has in its statement of claim vis-à-vis the contract to plead more than the fact that it had entered into the contract on which the suit is based.

(4) Section 20 of the Companies Act 1965 provides that an outsider, other than a debenture holder or the minister, may not raise ultra vires. The defendant is an outsider and not a debenture holder or the minister.

(5) There is no rule that for specific performance, good consideration is not good enough and that there should be valuable consideration. In any event, it would be most inequitable and unconscionable to allow the defendant at this stage, having agreed that each of the parties should go its separate way, to seek the aid of equity to avoid its legal obligations.

(6) The authorities show that a seller of shares not freely saleable in the open market is entitled to specific performance. As such, the present contract for the sale of shares is enforceable by specific performance.

[*Editorial Note*: The defendant has appealed to the Supreme Court vide Civil Appeal No 207 of 1988.]

Cases referred to

1 *Duncuft* v *Albrecht* 59 ER 1104 (refd)
2 *Gan Realty Sdn Bhd* v *Nicholas & Ors* [1969] 2 MLJ 110 (refd)
3 *Turner* v *Bladin* (1950-51) 82 CLR 463 (refd)
4 *Odessa Tramways Co* v *Mendel* (1878) 8 Ch D 235 (refd)

Legislation referred to

Companies Act 1965 ss 20, 132C(i)

Jennifer Cheong (*Miss*) for the plaintiff.
MS Murthi for the defendant.

Cur Adv Vult

VC George J: It is common ground that the plaintiff and the defendant entered into a written agreement dated 1 February 1986 by which the plaintiff agreed to sell and the defendant agreed to purchase 1,108,000 fully paid-up shares of $1 each in a private limited company called Seasian Hotel Sdn Bhd for $845,970.91. It was an express term of the contract that the defendant was to pay the purchase price to the plaintiff on 28 February 1986 whereupon the plaintiff was obliged to deliver to the defendant the relevant share certificates together with the relevant memorandum of transfer duly executed by the plaintiff as vendor.

Just two days after the parties had entered into the said agreement for the sale of the shares the defendant wrote its letter of 3 February 1986 to the plaintiff asking the plaintiff to agree to allowing the defendant to defer paying the purchase price for six months pleading the severe strain on its financial resources by the downturn in the economy that was being experienced by the country. The plaintiff replied immediately in writing saying that they could not agree to the proposed deferment of the payment. The plaintiff followed that letter by a solicitor's letter of demand one day after the payment should have been made giving the defendant a week until noon on 8 March 1986 to pay up failing which legal proceedings were threatened. The payment was not effected and on 22 July 1986 the plaintiff caused the writ herein to issue